(37,431)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 734

KRAUSS BROS. LUMBER COMPANY, PETITIONER,

vs.

DIMON STEAMSHIP CORPORATION, CLAIMANT OF THE STEAMSHIP "PACIFIC CEDAR," HER ENGINES, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 25, 1933

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NAMES AND ADDRESSES OF PROCTORS.

Messrs. HAYDEN, MERRITT, SUMMERS and BUCEY,
Proctors for Appellant, 540 Central Building, Seattle, Washington.

Messrs. BOGLE, BOGLE & GATES,
Proctors for Appellee, 611 Central Building, Seattle, Washington. [1*]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN ADMIRALTY—No. 13,090.

KRAUSS BROS. LUMBER COMPANY, a Corporation,
Libelant,

vs.

S. S. "PACIFIC CEDAR," Her Engines, Boilers, Tackle, Apparel and Furniture; DIMON STEAMSHIP CORPORATION, a Corporation,
Respondents;

DIMON STEAMSHIP CORPORATION, a Corporation,
Claimant.

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*Page-number appearing at the foot of page of original certified Apostles on Appeal.

STATEMENT.

Suit was commenced on May 18, 1931, by the filing of libel *in rem* against the respondent steamship "Pacific Cedar," her engines, boilers, tackle, apparel and furniture, and *in personam* against respondent Dimon Steamship Corporation, a corporation.

Names of Parties:

Krauss Bros. Lumber Company a corporation, libelant;

Steamship "Pacific Cedar," her engines, boilers, tackle, apparel and furniture, respondent;

Dimon Steamship Corporation, a corporation, respondent;

Dimon Steamship Corporation, a corporation, claimant.

Respondent steamship "Pacific Cedar," her engines, boilers, tackle, apparel and furniture, was attached under process issued upon libel, and thereafter, on May 19, 1931, was released upon bond filed by claimant in the sum of $3,000.00. [2]

Claim of ownership of Dimon Steamship Corporation as claimant of respondent steamship "Pacific Cedar," her engines, etc., was filed on May 19, 1931.

Claimant's exceptions to libel were filed on June 18, 1931.

The trial court's memorandum decision was filed July 14, 1931.

Libelant's petition for rehearing was filed July 27, 1931.

The trial court's memorandum decision, denying rehearing, was filed August 4, 1931.

Final decree of dismissal was signed September 14, 1931, and filed Sept. 18, 1931.

Filed Oct. 20, 1931. [3]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN ADMIRALTY—No. 13,090.

KRAUSS BROS. LUMBER COMPANY, a Corporation,

Libelant,

vs.

The Steamship "PACIFIC CEDAR," Her Engines, Boilers, Tackle, Apparel and Furniture, and DIMON STEAMSHIP CORPORATION, a Corporation,

Respondents.

LIBEL IN REM AND IN PERSONAM.

The libel *in rem* of Krauss Bros. Lumber Company, a corporation, against the steamship "Pacific Cedar," her engines, boilers, tackle, apparel and furniture, and *in personam* against the Dimon Steamship Corporation, in a cause of contract, civil and maritime, alleges:

I.

That the libelant Krauss Bros. Lumber Com-

pany now is, and at all times hereinafter mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Washington, having its principal office in the Henry Building in the city of Seattle, Washington, and now is and was engaged in the purchase of lumber and lumber products on the West Coast of the United States, and the transportation thereof to, and the sale thereof at, the Gulf and East Coasts of the United States.

II.

That respondent Dimon Steamship Corporation now is, and [4] at all times hereinafter mentioned was a corporation organized and existing under the laws of some foreign state, and engaged in the operation of a line of cargo vessels between the Pacific and the Atlantic and Gulf Coasts of the United States of America, doing business in the State of Washington, and maintaining an office in the city of Seattle. That at all times hereinafter mentioned respondent Dimon Steamship Corporation owned and operated the steamship "Pacific Cedar" as a freight carrier between said Pacific, Atlantic and Gulf ports of the United States of America.

III.

That the respondent steamship "Pacific Cedar," together with her engines, boilers, tackle, apparel and furniture, is an ocean going cargo vessel of American documentation, and is now lying at the port of Seattle, Washington, within the district and jurisdiction of the above-entitled court.

IV.

That on or about November 22, 1929, libelant Krauss Bros. Lumber Company entered into a booking contract with respondent Dimon Steamship Corporation, a copy of which is attached to this libel, marked Exhibit "A," under the terms of which the respondent Dimon Steamship Corporation confirmed libelant's engagement of space on the respondent steamship "Pacific Cedar," for the loading, on or about January 17, 1930, at Puget Sound and Grays Harbor ports on the Pacific Coast, and the shipment to Philadelphia and New York on the Atlantic Coast, of approximately 2500 M feet of lumber at an agreed rate of freight of $10 per M feet, said booking contract containing a provision that in the event a regular intercoastal carrier moved similar cargo at a lower rate, [5] such lower rate was to be applied to the shipments by libelant under the said booking contract, Exhibit "A."

V.

That under the provisions of and in accordance with the aforementioned booking contract, Exhibit "A," the libelant, between January 18 and January 25, 1930, at Puget Sound and Grays Harbor ports on the Pacific Coast of North America, loaded upon respondent steamship "Pacific Cedar," 1,465,730 feet of lumber, net measurement, which lumber was carried by said respondent steamship "Pacific Cedar," to the Atlantic Coast of the United States and discharged at the ports of New York, Philadelphia, and Baltimore, between

the 1st and 20th day of March, 1930, and that between the 1st and 20th days of March, 1930, at New York City, New York, the respondent Dimon Steamship Corporation and the respondent S. S. "Pacific Cedar" demanded, received and collected from libelant the sum of $14,657.30, the freight on the aforementioned shipment at the rate of $10 per M feet.

VI.

That in the month of January, 1930, a regular intercoastal carrier, the Luckenbach Steamship Company, moved similar cargo from Seattle, Washington, to Boston, Massachusetts, at a lower rate, to wit, a rate of $8.50 per M feet, net measurement.

VII.

That the agreed freight upon libelant's shipment on the respondent steamship "Pacific Cedar" at the rate of $8.50 per M feet, which was the rate charged by said regular intercoastal carrier on similar cargo, amounted to $12,458.71 instead of the $14,657.30 demanded and collected by respondents from libelant for the freight on said shipment. [6]

VIII.

That before the commencement of this proceeding libelant has demanded from respondents the sum of $2,198.00, the difference between the freight collected by respondents on the aforementioned shipment and the freight actually due under the booking agreement, Exhibit "A," and that respondents have wholly failed, refused and neglected to repay libelant the said sum of $2,198.00, or any

portion thereof, which sum of $2,198.00, with interest at the rate of 6% per annum from the 20th day of March, 1930, is now due and owing from respondents to libelant.

IX.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

WHEREFORE, libelant, Krauss Bros. Lumber Company, prays that process *in rem* in due form of law according to the practice of this Honorable Court in cases of admiralty and maritime jurisdiction may issue against the said respondent steamship "Pacific Cedar," her engines, boilers, tackle, apparel and furniture, and that all persons interested therein may be cited to appear and answer on oath all and singular the matters aforesaid, and that this court may be pleased to decree to libelant its damages aforesaid, together with interest and costs of suit, and that said respondent steamship "Pacific Cedar," her engines, boilers, tackle, apparel and funiture, may be condemned and sold to pay the same; and libelant also prays that process *in personam* in due form of law may issue against respondent Dimon Steamship Corporation, and that said respondent Dimon Steamship Corporation may be cited to appear and answer under oath all and singular [7] the matters aforesaid, and that this Honorable Court may be pleased to decree to libelant the damages, as aforesaid, with interest and costs of suit, and that libelant may have such other and further relief in the

premises as in law and justice it may be entitled to receive.

HAYDEN, MERRITT, SUMMERS & BUCEY,
Proctors for Libelant.
Office and Post Office Address:
540 Central Building,
Seattle, Washington.

United States of America,
State of Washington,
County of King,—ss.

Lane Summers, first being duly sworn, on oath states: That he is secretary of Krauss Bros. Lumber Company, a corporation, the libelant in the foregoing libel, and makes this verification for and on its behalf; that he has read said libel, knows the contents thereof, and believes the allegations thereof to be true.

LANE SUMMERS.

Subscribed and sworn to before me this 18th day of May, 1931.

[Seal] G. H. BUCEY,
Notary Public in and for the State of Washington,
Residing at Seattle. [8]

EXHIBIT "A."

DIMOND STEAMSHIP CORPORATION INTERCOASTAL SERVICE.

Percy S. Laing Shipping Company, Inc.,
General Agents,
1015 Alaska Building,
Seattle, Washington.

New York, November 22, 1929.

Messrs. Krauss Bros. Lumber Company,
230 Park Avenue,
New York City.

Dear Sirs:

We confirm, subject to conditions hereinafter stated, your engagement of space on the American S/S "PACIFIC CEDAR," Voy. 10 E. B. expected to be ready to load about January 17, 1930.

Commodity and Quantity: 2500 M ft. Lumber—usual Atlantic Coast specifications; not exceeding 40 ft. in length.

Loading Port: Puget Sound/Grays Harbor.

Rate of Freight: $10.00 per M. ft. net measurement.

Destination: Philadelphia/New York.

Remarks: No shift to load or discharge for less than 500 M. ft.

P. L. I. B. Certificates and mill specifications to be furnished for each lot.

In event regular intercoastal carrier moves similar cargo at lower rate, such lower rate to be applied.

1. Cargo to be delivered alongside, and to be taken from alongside within reach of ship's tackles as fast as steamer can handle; terminal charges, unless otherwise specifically provided, shall be assessed against cargo. When lumber is delivered at open piers, all charges, including wharfage in excess of legal wharfage on ship or cargo, stowage in cars, on lighters and handling or piling on wharf, are for consignee's account. No deliveries of lumber to be made at closed piers. Steamer reserves the right to discharge at any pier or piers within customary lighter limits as in effect by all railroads. Where specified discharge berth is named herein, such berth to be available when steamer is ready to discharge or steamer has option of discharging at another berth or into lighters, all expenses for such discharge to be for account of cargo.

2. Dates named are as nearly correct as can now be estimated and are not guaranteed.

3. This engagement is contingent upon the safe arrival of vessel in loading port in fit condition to load cargo.

4. Carrier at its option may ship the above cargo by any other [9] vessel equivalent in classification, either steam or motor being interchangable.

5. The carrier does not assume the care, custody, control or safety of, and shall not be liable for, the cargo until it is loaded on board the vessel, nor for demurrage, storage or any other charges whatsoever that may accrue against shipment while awaiting delivery on board vessel.

6. Timbers or lumber over 40 feet in length, not accepted under this engagement unless specially arranged for herein. Vessel to have the privilege of carrying all or any portion of lumber on deck, unless otherwise specified herein.

7. Cargo to be delivered when required by the vessel and within reach of ship's tackle according to the custom of the port.

8. Upon the cargo being loaded on the vessel it shall be carried subject to the terms, exceptions and conditions of the carrier's regular bill of lading, which shipper hereby agrees to accept and be bound by.

9. If arrival of vessel in proper condition to safely receive, care for and carry the above cargo is delayed, hindered or prevented by causes beyond carrier's control, including strikes, lockouts, Acts of Governments and of offices and crews of vessels, the carrier shall have the option of cancelling this contract, or of repairing said vessel within a reasonable time and prosecuting the voyage, or of substituting another therefor.

10. This contract is not assignable or space covered hereby is not transferable without the written consent of the carrier being first obtained, and may be cancelled by the carrier if it is assigned or space transferred without such consent.

11. If shipper cancels or fails to ship by said steamer or substitute without the written consent of the carrier, shipper shall be responsible to carrier for loss of revenue to vessel.

12. This confirmation of engagement when

signed becomes a binding contract which cannot be altered or cancelled except by mutual consent in writing.

DIMON STEAMSHIP CORPORATION.
By (Signed) J. W. CHAPMAN.

Accepted:

KRAUSS BROS. LUMBER CO.

Filed May 18, 1931. [10]

(Title of Court.)

MONITION AND ATTACHMENT.

The President of the United States of America to the Marshal of the United States for the Western District of Washington, GREETING:

WHEREAS, a libel hath been filed in the United States District Court for the Western District of Washington, on the 18th day of May, in the year of our Lord one thousand nine hundred and 29, by KRAUSS BROS. LUMBER COMPANY, a Corporation, Libelant, vs. The Steamship "PACIFIC CEDAR," Her Engines, Boilers, Tackle, Apparel and Furniture, and DIMON STEAMSHIP CORPORATION, a Corporation, Respondents, for the reasons and causes in the said libel mentioned, and praying the usual process and monition of the said court in that behalf be made, and that all persons interested in the said "Pacific Cedar," or vessel, her tackle, etc., may be cited in general and special to answer the premises and all proceedings being had that the said "Pacific Cedar" or vessel, her tackle, etc., may for the causes in the said libel men-

tioned, be condemned and sold to pay the demands of the libellant.

YOU ARE THEREFORE HEREBY COMMANDED to attach the said "Pacific Cedar," or vessel, her tackle, etc., and to retain the same in your custody until the further order of the Court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said Libel, that they be and appear before the said court, to be held at Seattle, in the Western District of Washington, on the 4th day June, A. D. 1931, at 10 o'clock in the forenoon of the same day, if that day shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. And what you shall have done in the premises do you then and there make return thereof together with this writ.

WITNESS, the Hon. GEORGE M. BOURQUIN, Judge of said court, at the city of Seattle, in the Western District of Washington, this 18th day of May, in the year of our Lord one thousand nine hundred and 31, and of our Independence the one hundred and fifty-fifth.

[Seal]

ED. M. LAKIN,
Clerk.

By T. W. Egger,
Deputy Clerk.

HAYDEN, MERRITT, SUMMERS & BUCEY,
Proctors for Libellant.

Office of U. S. Marshal,
Western District of Washington,—ss.

In obedience to the within monition, I attached the S.S. "Pacific Cedar" therein described on the 18 day of May, 1931, and have given due notice to all persons claiming the same that this Court will, on the 4th day of June, 1931 (if that day should be a day of jurisdiction, if not, on the next day of jurisdiction thereafter), proceed to the trial and condemnation thereof should no claim be interposed for the same. And that on the 19 day of May, 1931, I released the said vessel upon receiving a notice of bonding signed by the Clerk of the U. S. District Court.

Date May 18, 1931.

CHARLES E. ALLEN,
U. S. Marshal.
By WALTER BOGAN,
Deputy Marshal.

MARSHAL'S FEES AND EXPENSES:

	Dollars	Cents
For serving Attachment and Monition.....	2.00	
Miles traveled....., at.....cents per mile— Expense		.20
Preparing Notice of Seizure for posting.....		
Preparing Copy of Notice of Seizure for Publisher		
Publishing Notice of Seizure.....		
Posting Notice of Seizure.....		
Percentage on $..... at .....per cent.....		

	Dollars	Cents
Keeper's fees.....day at $2.50 per day.....	....	
Releasing vessel	.50	
Total	2.70	

Return filed July 11, 1931.

Repayment of difference on freight chgs. $2,198.00 plus interest.

....,

Proctor for Libellant. [11]

CITATION.

No. 13,090.

Western District of Washington,—ss.

The President of the United States of America to the Marshal of the United States for the Western District of Washington, GREETING:

WHEREAS a libel hath been filed in the United States District Court for the Western District of Washington, on the 18th day of May, A. D. 1931, by KRAUSS BROS. LUMBER COMPANY, a Corporation, Libelant, vs. The Steamship "PACIFIC CEDAR," Her Engines, Boilers, Tackle, Apparel and Furniture, and DIMON STEAMSHIP CORPORATION, a Corporation, Respondents, in a certain action, civil and maritime, for repayment of difference in freight charges therein alleged to be due and owing from respondents to said libellant, amounting to Two Thousand One Hundred Ninety-eight and no/100ths Dollars ($2,198.00), plus interest at 6% from March 20, 1930, and praying that a

citation may issue against the said respondent, pursuant to the rules and practice of this court:

NOW THEREFORE, we do hereby empower and strictly charge and command you, the said Marshal, that you cite and admonish the said respondent, if it shall be found in your district, that it be and appear before the said District Court, on Thursday, the 4th day of June, A. D. 1931, at ten o'clock in the forenoon of said day, at the court-room thereof, at Seattle, then and there to answer the said libel, and to make its allegations in that behalf.

And have you then and there this writ, with your return endorsed thereon.

WITNESS, the Hon. GEORGE M. BOURQUIN, Judge of said court, at the city of Seattle, in said Western District of Washington, this 18th day of May, A. D. 1931.

[Seal] ED. M. LAKIN,
Clerk.
By T. W. Egger,
Deputy Clerk.

HAYDEN, MERRITT, SUMMERS & BUCEY,
Proctors for Libellant.

MARSHAL'S RETURN.

Office of U. S. Marshal,
Western District of Washington,—ss.

I hereby certify that I served the within citation at Seattle, Washington, on the 18 day of May, 1931, by then and there delivering to and leaving with Percy Lang, Freight Agent for the Dimon

S. S. Co., at said time and place, a duly certified copy thereof.

CHARLES E. ALLEN,
United States Marshal.
By WALTER BOGAN,
Deputy Marshal.

MARSHAL'S FEES:

	Dollars	Cents
Service	2.00	
Mileage	.12	
Expenses		
Total Charges	2.12	

Return filed May 18, 1931. [12]

(Title of Court and Cause.)

LIBELANT'S STIPULATION FOR COSTS.

KNOW ALL MEN BY THESE PRESENTS: That we, Krauss Bros. Lumber Company, a corporation, as principal, and American Surety Company of New York, a corporation authorized to do a surety business within the State of Washington, as surety, are held and firmly bound unto whom it may concern, in the sum of Two Hundred and Fifty Dollars ($250.00) for the payment of which sum well and truly to be made we do hereby bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

The condition of this obligation is such that,

WHEREAS, libel has been, or is about to be

filed in the above-entitled court, upon this 18th day of May, 1931, by the above-named libelant against the above-named respondents for the causes in said libel alleged.

NOW, THEREFORE, if the above-named principal shall pay all costs and expenses which shall be awarded against it by final decree of said court in said cause, or by any interlocutory order in the progress of said cause, or, in case of appeal by the appellate court, then this obligation shall be void; otherwise it shall remain in full force.

Dated this 18th day of May, 1931, at Seattle, Washington.

KRAUSS BROS. LUMBER COMPANY,
[Seal] By LANE SUMMERS,
Its Secretary,
(Principal).

AMERICAN SURETY COMPANY OF NEW YORK,
By A. E. KRULL.
A. E. KRULL,
Res. Vice-Pres.,
[Seal] Attest: J. A. TOMBERLIN,
Res. Asst. Secy.,
(Surety).

Filed May 18, 1931. [13]

(Title of Court and Cause.)

CLAIM.

To the Honorable Judge of the Above-entitled Court:

The Dimon Steamship Corporation, a corporation, as owner of the above-named vessel "Pacific Cedar," her engines, boilers, tackle, apparel and furniture, intervening for its interest as such owner, now appears before this Honorable Court by and through Messrs. Bogle, Bogle & Gates, its proctors, and hereby claims said vessel, her engines, boilers, tackle, apparel and furniture and PRAYS that the said Dimon Steamship Corporation, a corporation, be permitted to defend accordingly, and that this court decree restitution to it, the said Dimon Steamship Corporation, a corporation, claimant of the said vessel "Pacific Cedar," her engines, boilers, tackle, apparel and furniture, and otherwise right and justice administer in the premises.

DIMON STEAMSHIP CORPORATION, a Corporation.

By BOGLE, BOGLE & GATES,

Its Proctors.

Filed May 19, 1931. [14]

(Title of Court and Cause.)

STIPULATION FOR COSTS.

KNOW ALL MEN BY THESE PRESENTS, that the undersigned Dimon Steamship Corporation, a corporation, as principal, and National Surety Company, a corporation, organized and existing under and by virtue of the laws of the State of New York and duly authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto whom it may concern in the sum of Two Hundred Fifty Dollars ($250.00) for the payment of which sum well and truly to be made they do hereby bind themselves and their respective successors and assigns jointly and severally firmly by these presents.

The condition of this obligation is such that,

WHEREAS, a libel has been filed in the above-entitled court by the above-named libellant against the steamship "Pacific Cedar," her engines, boilers, tackle, apparel and furniture for a cause of contract of affreightment, civil and maritime, and

WHEREAS, the above-named principal has filed its claim in the above-entitled court in the above cause, claiming the said vessel, her engines, boilers, tackle, apparel and furniture, and has applied for a release of said vessel from the custody of the United States Marshal for the Western District of the State of Washington,

NOW THEREFORE, if the above bounden principal shall abide by and pay all costs and expenses

which shall be awarded against it by the decree of the above-entitled court in the above cause, or by any interlocutory order of said court in the progress of said cause, or in the case of appeal by any appellate court, then this obligation shall be void, otherwise it shall be and remain in full force and effect.

IN WITNESS WHEREOF, said principal has hereunto subscribed its name and said surety has hereunto subscribed its name and affixed its seal this 19th day of May, 1931.

DIMON STEAMSHIP CORPORATION, a Corporation,
By PERCY S. LAING SHIPPING CO., INC.,
Agents [15]
By PERCY S. LAING,
President,
Principal.

NATIONAL SURETY COMPANY,
a Corporation,
[Seal] J. H. LOBDELL,
Attorney-in-fact,
Surety.

Filed May 19, 1931. [16]

(Title of Court and Cause.)

RELEASE BOND.

KNOW ALL MEN BY THESE PRESENTS, that the undersigned Dimon Steamship Corporation, a corporation, as principal, and National

Surety Company, a corporation, organized and existing under and by virtue of the laws of the State of New York and duly authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto the United States marshal for the Western District of Washington, in the sum of Three Thousand Dollars ($3,000.00) to be paid to said marshal, for the payment of which well and truly to be made they do hereby bind themselves and their respective successors and assigns jointly and severally firmly by these presents.

The condition of this obligation is such that, WHEREAS a libel has been filed in the above-entitled court by the above-named libellant against the steamship "Pacific Cedar," her engines, boilers, tackle, apparel and furniture, for the alleged sum of Twenty-one Hundred Niney-eight Dollars ($2,198.00) and interest, on which process of attachment has issued, and the said vessel, her engines, boilers, tackle, apparel, and furniture are now in the custody of the United States marshal for the Western District of Washington under said attachment, and

WHEREAS the above-named principal has applied for the discharge and release of said vessel, her engines, boilers, tackle, apparel and furniture from the custody of said United States marshal and has filed a claim in the above-entitled court in the said cause, claiming the said steamship "Pacific Cedar," her engines, boilers, tackle, apparel and furniture, and has also filed therein a stipulation

for costs pursuant to the rules and practices of this Honorable Court. [17]

NOW THEREFORE, if the above-bounden principal shall abide by and answer the decree of said court in the above cause, or in the case of appeal, the decree of any appellate court in the said cause, then this obligation shall be void, otherwise it shall be and remain in full force and effect.

IN WITNESS WHEREOF said principal has hereunto subscribed its name and said surety has hereunto subscribed its name and affixed its seal this 19th day of May, 1931.

DIMON STEAMSHIP CORPORATION, a Corporation,
By PERCY S. LAING SHIPPING CO., INC.,
Agent,
By PERCY S. LAING,
President,
Principal.

NATIONAL SURETY COMPANY,
a Corporation.
[Seal] By J. H. LOBDELL.

United States of America,
Western District of Washington,
Northern Division,—ss.

On this 19th day of May, 1931, before me, a notary public, appealed Percy S. Laing, known to me to be president of Percy S. Laing Shipping Co., Inc., Agent for Dimon Steamship Corporation, a corporation, named in and that executed the foregoing bond and acknowledged the said

instrument to be the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument for and on behalf of said corporation.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] CLAUDE E. WAKEFIELD,
Notary Public in and for the State of Washington,
Residing at Seattle. [18]

United States of America,
Western District of Washington,
Northern Division,—ss.

On this 19th day of May, 1931, before me, a notary public, appeared J. H. Lobdell, to me known to be the attorney-in-fact of National Surety Company, a corporation, the corporation named in and that executed the foregoing bond as surety, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument for and on behalf of said corporation.

IN WITNESS WHEREOF I have hereunto set my hand and official seal the day and year in this certificate first above written.

[Seal] CLAUDE E. WAKEFIELD,
Notary Public in and for the State of Washington,
Residing at Seattle.

The sufficiency of the surety on the foregoing bond is hereby approved, and justification of surety waived, and notice of bonding waived.

Dated this 19th day of May, 1931.

HAYDEN, MERRITT, SUMMERS & BUCEY,

Proctors for Libellant.

The sufficiency of the surety on the foregoing bond is hereby approved, this 19th day of May, 1931.

BOURQUIN,

Judge, United States District Court for the Western District of Washington, Northern Division.

Filed May 19, 1931. [19]

(Title of Court and Cause.)

EXCEPTIONS TO LIBEL.

To the Honorable Judges of the Above-entitled Court:

The exceptions of Dimon Steamship Corporation, a corporation, respondent and claimant above named and claimant of the steamship "Pacific Cedar," her engines, boilers, tackle, apparel and furniture, in the above-entitled cause respectfully show:

That the said libel filed herein is insufficient and is excepted to upon the following grounds, to wit:

I.

That the facts averred in the libel are insufficient to constitute a cause of action.

II.

That the facts averred in the libel do not constitute a cause of action within the admiralty and maritime jurisdiction of this court.

III.

That the facts averred in the libel do not give rise to any maritime lien upon the steamship "Pacific Cedar" and that an action *in rem* against said vessel will not lie.

BOGLE, BOGLE & GATES,
Proctors for Respondent and Claimant, Dimon Steamship Corporation, a Corporation.

Date: June 18,——.

Received copy of within exceptions.
HAYDEN, MERRITT, SUMMERS & BUCEY,
For Libellant.

Filed Jun. 18, 1931. [20]

DECISION.

Filed July 14, 1931.

HAYDEN, MERRITT, SUMMERS & BUCEY, for Libellants,

BOGLE, BOGLE & GATES, for Respondents.

NETERER, District Judge.—The three cases brought by the same libellant, Krauss Bros. Lbr. Co., against the "Pacific Cedar," "Pacific Oak," and "Pacific Fir," are submitted together.

The libels are practically the same. Each seeks to recover an amount alleged to be due under a provision contained in a contract at a given rate of affreightment per thousand feet, with a provision "in the event regular intercoastal carrier moves similar cargo at lower rate, such lower rate to be applied." The libels were filed about seventeen months after the cargo was carried, delivered and paid for. It is alleged the cargo was carried, the freight was paid, and that "at the same time * * * a regular intercoastal carrier * * * moved similar cargo from Seattle, Washington, to Boston, Massachusetts, at a lower rate * * * ." There is no allegation in the libel giving conditions under which this shipment was made, whether a regular coastal shipment, or whether a "distress" shipment. The freight upon the cargo was paid without protest. Exceptions to the libel are filed in each case: (a) Facts alleged are insufficient to constitute a cause of action; (b) do not constitute a cause of action within the admiralty and maritime jurisdiction; (c) there is no maritime lien and no jurisdiction *in rem.*

The court must first determine its jurisdiction. The Constitution grants judicial power to the United States District courts in all cases of admiralty and maritime jurisdiction. Originally, the admiralty jurisdiction was but [21] another phrase for the power of the admiral, next in power to the monarch, and extended to nonadmiralty cases "beyond the sea." The ancient and time honored privilege of admiralty (Edward's Ad. Juris. 17), Smart vs. Wolf, 3 T. R. 348, does not

obtain under our Constitution. English Stat., 2, Henry IV, Chap. 2, provides " * * * Admirals shall not intermingle anything done in the realm but only of a thing done upon the sea." The added word, "maritime," in our law restricts admiralty to maritime service. In The Eclipse, 135 U. S. 599, at 608, the Court says: "The jurisdiction embraces all maritime contracts * * * and it depends in cases of contract upon the nature of the contract and is limited to contracts, claims and services purely maritime, and touching rights and duties appertaining to commerce and navigation." Peoples Ferry Co. vs. Beers, 61 U. S. 399 (20 How.), at 401. Admiralty has not power to draw within its jursidiction matters primarily nonmaritime. U. T. & L. Co. vs. N. Y. & B. L., 180 Fed. 902. Its jurisdiction is confined exclusively to maritime issues. The Ada, 250 Fed. 194; Grant et al. vs. Poillon et al., 61 U. S. 162 (20 How.). The libels are for money had and received, the contract of a special nature, for less charge on named contingencies, the contingency had not arisen and the freight was paid and the essence of the contract now claimed is for repayment and this is not maritime. Plummer vs. Wall, 4 Mason C. R. 380. The fact that the contingent agreement was included in the charter-party does not of itself make it a maritime contract. 91 Fed. 267.

The ship was liable to safely deliver the cargo, and the cargo was liable to the ship for carriage. The Freeman, 52 U. S. 182 (18 How.). There was a reciprocal pledge for service and compensation

between the ship and the cargo. Bulkley vs. Maumkeag S. C. Co., 66 U. S. 386 (24 How.); The Keokuk, 76 U. S. 517 (9 Wall.); The Maggie Hammond, 76 U. S. 435; The Belfort, 74 U. S. 624 (7 Wall.). The lein of the cargo owner upon the [22] ship is limited by the corresponding and reciprocal right of the ship owner upon the cargo. The ship and cargo each discharged the maritime obligation; every act having relation to maritime service was fully performed. The fact that the contract contained a stipulation that upon contingency another rate should apply is not decisive, but rests on the inquiry: May the claim for rebate on the alternate rate be separably enforced? Compagnie Francaise vs. Bonasse, 19 Fed. (2) 777. The liability of the ship for transportation, and the liability of the cargo for affreightment do not differ in their nature and legal effect. The ship has a personalty of her own, is competent to contract, is liable for her obligations and her torts. Tucker vs. Alexander, 183 U. S. 424, at 438. The cargo, as well, has a similar status, and after the cargo is delivered all claim of the ship on the cargo is ended and any claim by reason of contract for increase of carriage charge on contingency, with the cargo owner, could not be impressed upon cargo, but only asserted against the owner, and by the same token, when maritime relation ended by delivery of the cargo and payment of the freight, all claim for repayment on the contract between owners of cargo and owners of the ship upon separable contract, is not a lien upon the ship.

It was only a right to lessen the ship's lien on cargo for carriage to the amount of the rebate agreed on while the relation between ship and cargo obtained but on payment to the ship for the affreightment the owner alone is liable for the repayment on his contract. A maritime lien is a necessary basis for an admiralty proceeding *in rem*, and may be prosecuted in any district where the offending vessel is found. The Propeller Commerce, 66 U. S. 615. It is a claim for secret lien and would operate to the prejudice of general creditors, and is *strioti juris* (Osaka Shosen Kaisha, [23] vs. Pacific Export Lbr. Co., 260 U. S. 490). A maritime lien can be effected only by some visible contact with or occurrence relating to the service of the ship and must be a manifest and open, ocular, physical endeavor of maritime service which may serve as notice to the world of an existing claim. If the claims had been claimed as offset *pro tanto* to the carriage charge, before payment, admiralty no doubt would have drawn to it equitable principles and so decreed. N. Y. Dock Co. vs. S. S. Poznan, 274 U. S. 117. The principle of hypothecation is the basis of a maritime lien, and the hypothecation cannot apply upon secret agreements between the owners, *supra*, for repayment of freight on certain contingencies and after ending of reciprocal relation between ship and cargo. The period of reciprocal relation between ship and cargo is from the beginning and ending of the voyage,—the receipt of cargo and the delivery of cargo. Vandewater vs. Mills, 60 U. S. 82. Any status or relation *ante* or *post* maritime

service on a separable stipulation is nonmaritime. Admiralty has no jurisdiction of a contract to procure marine insurance. Marquard vs. French, 53 Fed. 603; Home Ins. Co. vs. Merchants Transp. Co., 16 Fed. (2) 372; and by the same token, it has no jurisdiction for repayment of carriage charge on the separable contract in issue on a contingent agreement between owners of ship and owners of cargo.

In principle, aside from the statute (sec. 24, J. C.—Title 28, U. S. C. A., sec 41, sub. 3), creating admiralty a prize court (enacted 1875 (18 Stat. 470), 1887 (24 Stat. 552), 1888 (25 Stat. 433), 1911 (36 Stat. 1091)), this action is not unlike an action for division of prize money under contract made on land and which is held not within admiralty jurisdiction. See cases in Vice-Admiralty and Admiralty by Judge Hough, The Oliver Cromwell (Castrid vs. Waddell), page 167 (New York, 1715–1758). [24]

Each libel is in the nature of *assumpsit* upon express contract made on land prior to carriage of cargo for rebate on carriage charges which have been paid, and is separable and can be separably enforced, and the actions are not maritime. Admiralty has not jurisdiction.

NETERER,
United States District Judge.

[Endorsed]: Filed Jul. 14, 1931. [25]

(Title of Court and Cause.)

PETITION FOR REHEARING.

Comes now libelant above named and petitions the above-entitled court for rehearing upon exceptions to libel filed in behalf of respondent and claimant Dimon Steamship Corporation, a corporation.

This petition is based upon the record in the above-entitled cause, together with libelant's memorandum of authorities presented and filed herewith.

Dated this 27th day of July, 1931, at Seattle, Washington.

HAYDEN, MERRITT, SUMMERS & BUCEY,
Proctors for Libelant.

Copy received on 7/27/31.

BOGLE, BOGLE & GATES,
Attorney for Claimant.

Filed Jul. 27, 1931. [26]

(Title of Court and Cause.)

DECISION.

HAYDEN, MERRITT, SUMMERS & BUCEY, for Libelant,

BOGLE, BOGLE & GATES, for Respondents and Claimant.

NETERER, District Judge.—The three last named cases were heretofore submitted and ex-

ceptions sustained. Petition for rehearing is filed. The first two cases are now submitted upon exceptions.

The libels are practically the same. Each seeks to recover an amount alleged to be due under a provision contained in a contract at a given rate of affreightment per thousand feet, with a provision "in the event regular intercoastal carrier moves similar cargo at lower rate, such lower rate to be applied." The libels were filed about seventeen months after the cargo was carried, delivered, and paid for. It is alleged the cargo was carried, the freight was paid, and that "at the same time * * * a regular intercoastal carrier * * * moved similar cargo from Seattle, Washington, to Boston, Massachusetts, at a lower rate * * * ." There is no allegation in the libel giving conditions under which this shipment was made, whether a regular coastal shipment, or whether a "distress" shipment. The freight upon the cargo was paid without protest. Exceptions to the libel are filed in each case: (a) Facts alleged are insufficient to constitute a cause of action; (b) do not constitute a cause of action within the admiralty and maritime jurisdiction; (c) there is no maritime lien and no jurisdiction *in rem*.

The court must first determine its jurisdiction. The Constitution grants judicial power to the United States District Courts in all cases of admiralty and maritime jurisdiction. Originally, the admiralty jurisdiction was but another phrase

for the power of the admiral, next in power to the monarch, and extended to nonadmiralty cases "beyond the sea." The ancient and time honored privilege of [27] admiralty (Edward's Ad. Juris. 17), Smart vs. Wolf, 3 T. R. 348, does not obtain under our constitution. English Stat. 2, Henry IV, Chap. 2, provides: "* * * Admirals shall not intermingle anything done in the realm but only of a thing done upon the sea." The added word, "maritime," in our law restricts admiralty to maritime service. In The Eclipse, 135 U. S. 599, at 608, the Court says: "The jurisdiction embraces all maritime contracts * * * and it depends in cases of contract upon the nature of the contract and is limited to contracts, claims and services purely maritime, and touching rights and duties appertaining to commerce and navigation." Peoples Ferry Co. vs. Beers, 61 U. S. 399 (20 How.), at 401. Admiralty has not power to draw within its jurisdiction matters primarily nonmaritime. U. T. & L. Co. vs. N. Y. & B. L., 180 Fed. 902. Its jurisdiction is confined exclusively to maritime issues. The Ada, 250 Fed. 194; Grant et al. vs. Poillon et al., 61 U. S. 162 (20 How.). The libels are for money had and received, the contract of a special nature, for less charge on named contingency; the contingency had not arisen and the freight was paid, and the essence of the contract now claimed is for repayment, and this is not maritime. Plummer vs. Wall, 4 Mason C. R. 380. The fact that the contingent agreement was included in the charter-party does not of it-

self make it a maritime contract. Keyser vs. Blue Star S. S. Co., 91 Fed. 267.

The ship was liable to safely deliver the cargo, and the cargo was liable to the ship for carriage. The Freeman, 59 U. S. 182 (18 How.). There was a reciprocal pledge for service and compensation between the ship and the cargo. Bulkeley vs. Maumkeag S. C. Co., 66 U. S. 386 (24 How.); The Keokuk, 76 U. S. 517 (9 Wall.); The Maggie Hammond, 76 U. S. 435; The Belfort, 74 U. S. 624 (7 Wall.). The lien of the cargo owner upon the ship is limited by the corresponding and reciprocal right of the ship owner upon the cargo. The ship and cargo each discharged the maritime obligation; every act having relation to [28] maritime service was fully performed. The fact that the contract contained a stipulation that upon contingency another rate should apply is not decisive, but rests on the inquiry: May the claim for rebate on the alternate rate be separably enforced? Compagnie Francaise vs. Bonasse, 19 Fed. (2) 777. The liability of the ship for transportation, and the liability of the cargo for affreightment do not differ in their nature and legal effect. The ship has a personalty of her own, is competent to contract, is liable for her obligations and her torts. Tucker vs. Alexander, 183 U. S. 424, at 438. The cargo, as well, has a similar status, and after the cargo is delivered all claim of the ship on the cargo is ended and any claim by reason of contract for increase of carriage charge on contingency, with the cargo

owner, could not be impressed upon cargo, but only asserted against the owner, and by the same token, when maritime relation ended by delivery of the cargo and payment of the freight, all claim for repayment on the contract between owners of cargo and owners of the ship upon separable contract, is not a lien upon the ship. It was only the right to lessen the ship's lien on cargo for carriage to the amount of the rebate agreed on while the relation between ship and cargo obtained, but on payment to the ship for the affreightment the owner alone is liable for the repayment on his contract. A maritime lien is a necessary basis for an admiralty proceeding *in rem*, and may be prosecuted in any district where the offending vessel is found. The Propeller Commerce, 66 U. S. 615. It is a claim for secret lien and would operate to the prejudice of general creditors, and is *stricti juris* (Osaka Shosen Kaisha vs. Pacific Export Lbr. Co., 260 U. S. 490). A maritime lien can be effected only by some visible contract with or occurrence relating to the service of the ship and must be a manifest and open, ocular, physical endeavor of maritime service which may serve as notice to the world of an existing claim. If the claims had been claimed as offset *pro tanto* to the carriage charge, before payment, admiralty no doubt would have drawn to it equitable principles and so decreed. N. Y. Dock Co. vs. S. S. Poznan, 274 U. S. 117. The principle of hypothecation [29] is the basis of a maritime lien, and the hypothecation cannot apply upon secret agreements

between the owners, *supra,* for repayment of freight on certain contingencies and after ending of reciprocal relation between ship and cargo. The period of reciprocal relation between ship and cargo is from beginning and ending of the voyage,—the receipt of cargo and the delivery of cargo. Vandewater vs. Mills, 60 U. S. 82. Any status or relation *ante* or *post* maritime service on a separable stipulation is nonmaritime. Admiralty has no jurisdiction of a contract to procure marine insurance. Marquard vs. French, 53 Fed. 603; Home Ins. Co. vs. Merchants Transp. Co., 16 Fed. (2) 372; and by the same token, it has no jurisdiction for repayment of carriage charge on the separable contract in issue on a contingent agreement between owners of ship and owners of cargo. In Israel vs. Moore & McCormack Co., 295 Fed. 919, the master of the ship wrongfully exacted from the shipper carriage charges for cargo jettisoned, and therefore not delivered; it was a failure to safely deliver the cargo; jettison was the act of the ship by open, obvious conduct of its crew. The ship was liable for breach; it did not fulfill its promise. The instant claims are not predicated on any act of open, obvious conduct of the ship, but upon express contract between the owners of the cargo and the owner of the ship, which is separable.

In Church vs. Shelton, 5 Fed. Cas. 674 (No. 2714), the master of the ship conspired with wreckers to strand his ship and the owner of the cargo paid large sums for salvage. Admiralty had jurisdiction. The bill of lading, founded on con-

tract, was to convey safely the merchandise. The act of the master in stranding was open and obvious, and the owner and the ship were liable for the master's acts. The merchandise was not delivered, through the fraudulent acts of the master, whose acts were open, and obvious, and it was a maritime service. [30]

In Pillsbury Flour Co. vs. Interlake S. S. Co., 40 Fed. (2) 439, the contract included holding the cargo in storage after transportation on the water and before delivery. The relation between the shipper and the carrier had not ended, and could not end until the cargo was delivered, and this was by special agreement between the owners of the cargo and the owner of the ship, to which the ship was necessarily a party and the relation between carrier and shipper, not having ended by *deliver,* admiralty rightly assumed jurisdiction of the whole.

In The Oceano, 148 Fed. 131, by stipulation in the charger party for advance freight to the master, which was to be deducted from the freight on delivery of the cargo, by mistake a part was not deducted, and the court held refusal to pay on the part of the owner for advance freight was a breach of the charter-party and not separable. The claim did not rest on a contingency, but obtained from the beginning, interwoven with acts of the master, ship, and cargo and shipper. No act of a third party was required to give life to the claim, like happening of a contingency. In the case at bar, no act of the master gave life to the

claim, nor did the agreement between the owners of the ship and the owners of the cargo, but the act of another.

In principle, aside from the statute (sec. 24, J. C.—Title 28, U.S.C.A., sec 41, sub. 3), creating admiralty a prize court (enacted 1875 (18 Stat. 470), 1887 (24 Stat. 552), 1888 (25 Stat. 433), 1911 (36 Stat, 1091), this action is not unlike an action for division of prize money under contract made on land and which is held not within admiralty jurisdiction. See cases in Vice-Admiralty and Admiralty by Judge Hough, The Oliver Cromwell (Castrid vs. Waddell), page 167 (New York 1715-1758). [31]

Each libel is in the nature of *assumpsit* upon express contract made on land prior to carriage of cargo for repayment on carriage charges which have been paid, and is separable and can be separably enforced, and the actions are not maritime. Admiralty has not jurisdiction.

The motions for rehearing are denied, and the exceptions to libels are sustained. An order dismissing the libels may on notice be presented.

NETERER,
United States District Judge.

[Endorsed]: Filed Aug. 4, 1931. [32]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN ADMIRALTY—No. 13,090.

KRAUSS BROS. LUMBER COMPANY, a Corporation,

Libelant,

vs.

The Steamship "PACIFIC CEDAR," Her Engines, Boilers, Tackle, Apparel and Furniture, and DIMON STEAMSHIP CORPORATION, a Corporation,

Respondents,

and

DIMON STEAMSHIP CORPORATION, a Corporation,

Claimant.

DECREE OF DISMISSAL.

Libelant above named having heretofore filed a libel in the above cause *in rem* against the steamship "Pacific Cedar" and *in personam* against Dimon Steamship Corporation, a corporation, secured the seizure of said vessel by the United States marshal; thereupon the claimant and respondent, Dimon Steamship Corporation filed its claim to said vessel and secured its release in due form, by filing herein a bond in the sum of $3,000.00; and the said respondent and claimant having thereafter excepted to the libel, and the whole thereof, on the

ground that admiralty had no jurisdiction of this said cause, and that no maritime lien existed against the respondent vessel by reason of the matters alleged in the libel, and the court having heard arguments by proctors for both parties, and the matter having been submitted upon briefs and duly considered by the Court; and the Court having thereafter rendered and filed herein its memorandum decision sustaining the exceptions to the libel and directing that an order dismissing the libel be entered herein, upon notice, and libelant having thereafter petitioned for rehearing and the matter being again submitted and considered by the Court, and the Court having filed a second memorandum decision, sustaining the exceptions to the libel, now therefore, upon notice duly given by Bogle, Bogle & Gates, proctors for respondent and claimant, it is [33]

ORDERED, ADJUDGED AND DECREED that the libel herein be and the same is hereby dismissed on the following grounds, to wit: (1) That admiralty has no jurisdiction; (2) that no maritime lien exists; and that respondent and claimant, Dimon Steamship Corporation, have and recover from the libelant its costs and disbursements herein to be taxed in the sum of Sixty-five and 50/100 Dollars ($65.50).

Libelant requests and is allowed an exception to the foregoing decree.

Dated this 14 day of Sept., 1931.

JEREMIAH NETERER,
District Judge

Approved.

BOGLE, BOGLE & GATES,
Proctors for Claimant.

Copy of foregoing decree received; same is approved as to form only. Exception is hereby taken to said decree and each and every part thereof.

HAYDEN, MERRITT, SUMMERS & BUCEY,

Proctors for Libelant.

Libelant's exception is hereby allowed.

NETERER,
District Judge.

Filed Sept. 18, 1931. [34]

NOTICE OF APPEAL.

To Dimon Steamship Corporation, a Corporation, as Respondent and as Claimant, and to Bogle, Bogle & Gates, Its Proctors, and to the Honorable JEREMIAH NETERER, Judge, and Ed. M. Lakin, Clerk of the Above-entitled Court:

You, and each of you, will please take notice that Krauss Bros. Lumber Company, a corporation, as libelant in the above-entitled cause, hereby appeals from that certain final decree, signed by the Honorable Jeremiah Neterer, Judge of the above-entitled court, upon September 14, 1931, and filed with the Clerk of said court in the above-entitled cause upon September 18, 1931, in favor of the respondents S.S. "Pacific Cedar," her engines, boilers,

tackle, apparel and furniture, and Dimon Steamship Corporation, a corporation, and in favor of claimant, Dimon Steamship Corporation, a corporation, and against said libelant, Krauss Bros. Lumber Company, a corporation, and hereby appeals from the whole of said final decree, and from each and every part thereof, and particularly from the following parts [35] thereof, to wit:

1. That part of said decree that dismisses the libel in the above-entitled cause;

2. That part of said decree that assigns as a ground for such dismissal that admiralty had no jurisdiction;

3. That part of said decree which assigns as a further ground for such dismissal that no maritime lien existed; and,

4. That part of said decree allowing against libelant judgment for costs and disbursements in the sum of $65.50;

to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 14 day of October, 1931.

HAYDEN, MERRITT, SUMMERS & BUCEY,

Proctors for Libelant Krauss Bros. Lumber Company, a Corporation.

Filed Oct. 20, 1931. [36]

(Title of Court and Cause.)

ACKNOWLEDGMENT OF SERVICE.

Due service of notice of appeal, copy of which is hereto attached and by this reference made a part hereof, and receipt of copy of such notice of appeal after the filing of the same on the 14 day of October, 1931, in the office of the Clerk of the above-entitled court, is hereby admitted this 14 day of October, 1931.

BOGLE, BOGLE & GATES,
Proctors for Respondent and Claimant.

Filed Oct. 20, 1931. [37]

PETITION FOR APPEAL.

To the Above-entitled Court, and the Honorable Judges Thereof:

Krauss Bros, Lumber Company, a Corporation, libelant above named, being aggrieved by that certain final decree, signed September 14, 1931, and filed in the above-entitled cause September 18, 1931, claims an appeal from said decree, and hereby petitions and prays that upon notice of appeal, presented and filed herewith, such appeal may be allowed, and citation on appeal be issued.

HAYDEN, MERRITT, SUMMERS & BUCEY,
Proctors for Krauss Bros. Lumber Company, a Corporation.

Copy of above petition for appeal received and service thereof admitted upon this 14 day of October, 1931.

BOGLE, BOGLE & GATES,
Proctors for Respondent and Claimant.

Filed Oct. 20, 1931. [38]

ASSIGNMENTS OF ERROR.

Krauss Bros. Lumber Company, a corporation, appellant, assigns errors in the rulings and proceedings in the above-entitled cause on the part of the trial court, the District Court of the United States for the Western District of Washington, Northern Division, as follows:

1. That said trial court erred in ruling by its memorandum decision, filed July 14, 1931, that no maritime lien existed in favor of libelant and against the respondent SS. "Pacific Cedar," as a result of the claim and cause of action alleged by the libel.

2. That said trial court erred in ruling that no maritime cause of action was alleged by said libel, as a result of which the trial court, sitting in admiralty, had no jurisdicton of the subject matter of the libel. [39]

3. That said trial court erred in ruling by its memorandum decision, filed August 4, 1931, that libelant was not entitled to a rehearing, and in adhering to the trial court's former decision.

4. That said trial court erred by its final decree of dismissal, signed Sept. 14, 1931, and thereafter

filed Sept. 18, 1931, by adjudging that no maritime lien existed in favor of libelant and against the respondent SS. "Pacific Cedar."

5. That said trial court erred by its final decree of dismissal, signed Sept. 14, 1931, and thereafter filed Sept. 18, 1931, by adjudging that admiralty had no jurisdiction of the subject matter of the cause.

6. That said trial court erred by its final decree of dismissal, signed Sept. 14, 1931, and thereafter filed Sept. 18, 1931, by dismissing libelant's libel and cause of action therein alleged.

7. That said trial court erred by its final decree of dismissal, signed Sept. 14, 1931, and thereafter filed Sept. 18, 1931, by awarding costs against libelant and in favor of claimant.

Dated this 14 day of October, 1931.

HAYDEN, MERRITT, SUMMERS & BUCEY,

Proctors for Appellant.

Filed Oct. 20, 1931. [40]

ORDER UPON PETITION FOR APPEAL.

The above-entitled cause coming on duly and regularly for hearing before the above-entitled court, the undersigned Judge presiding, this day, upon presentation of petition for appeal by Krauss Bros. Lumber Company, a corporation,—

NOW, THEREFORE, it is hereby CONSIDERED, ORDERED AND ADJUDGED that said

petition for appeal be allowed as prayed, and that citation on appeal issue.

Done this 14 day of October, 1931.

JEREMIAH NETERER,
U. S. District Judge.

Approved as to form this 14 day of October, 1931.

BOGLE, BOGLE & GATES,
Proctors for Respondent and Claimant.

Filed Oct. 20, 1931. [41]

STIPULATION AS TO APPEAL.

It is hereby stipulated by and between Krauss Bros. Lumber Company, a corporation, appellant, and Dimon Steamship Corporation, a corporation, appellee, as follows:

1. That apostles containing all matters designated by the praecipe herein prepared in behalf of appellant, shall be sufficient record on appeal.

2. That there may be omitted from such apostles the following:

(a) The full title of various pleadings, the full file-mark thereon, and the verification thereof, it being sufficient that the record on appeal contain a plain designation of the various pleadings and papers, together with a notation of the date when the same were filed and/or served.

3. That notwithstanding the expiration of the period of the present term of the above-entitled court in which final [42] decree in the above-

entitled cause was made and entered, appeal therefrom may be perfected and prosecuted thereafter, and the present term of court may be deemed to be continued and unexpired for such purpose.

4. That American Surety Company of New York, a corporation, as surety upon the stipulation for costs filed by appellant, Krauss Bros. Lumber Company, a corporation, at the time of the institution of the above-entitled cause, need not join or be joined as a party appellant herein.

5. That upon the authority hereof, without notice, order in conformity herewith and in approval hereof, may be entered by the above-entitled District Court or by the United States Circuit Court of Appeals for the Ninth Circuit, as may be appropriate.

HAYDEN, MERRITT, SUMMERS & BUCEY,

Proctors for Appellant Krauss Bros. Lumber Company.

BOGLE, BOGLE & GATES,

Proctors for Appellee Dimon Steamship Corporation.

Filed Oct. 20, 1931. [43]

ORDER AS TO APPEAL.

Upon oral motion of appellant herein, stipulation as to appeal on file in the above-entitled cause having been examined,—

NOW, THEREFORE, it is hereby ORDERED that the same be, and it hereby is, approved and the procedure therein contemplated authorized.

Done in open court this 14 day of October, 1931.

JEREMIAH NETERER,
U. S. District Judge.

Approved this 14 day of October, 1931.

BOGLE, BOGLE & GATES,
Proctors for Appellee Dimon Steamship Coporation.

Filed Oct. 20, 1931. [44]

MOTION FOR ORDER STAYING EXECUTION AND FIXING SUPERSEDEAS BOND.

Comes now Krauss Bros. Lumber Company, a corporation, libelant herein, and moves the Court for an order staying execution pending appeal from final decree in the above-entitled cause, and fixing the amount of supersedeas bond in the sum of Five Hundred Dollars.

HAYDEN, MERRITT, SUMMERS & BUCEY,
Proctors for Krauss Bros. Lumber Company, a Corporation.

Copy received on 14 day of October, 1931.

BOGLE, BOGLE & GATES,
Proctors for Respondent and Claimant.

Filed Oct. 20, 1931. [45]

ORDER STAYING EXECUTION AND FIXING AMOUNT OF SUPERSEDEAS BOND.

The above-entitled cause having duly and regularly come on for hearing before the above-entitled court, the undersigned Judge presiding, this day, upon motion for stay of execution pending appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and fixing the amount of supersedeas bond,—

NOW, THEREFORE, IT IS HEREBY ORDERED: That the sum of Five Hundred Dollars ($500.00) be, and the same hereby is, fixed as the amount of bond on appeal, to serve both as cost bond and supersedeas bond, such sum being declared reasonable and adequate security, and that upon the filing of cost and supersedeas bond on appeal, proper as to form and surety, in the sum of $500.00, execution upon final decree heretofore entered in the above-entitled cause shall be stayed [46] during the pendency of the appeal.

Done this 14 day of October, 1931.

JEREMIAH NETERER,
U. S. District Judge.

The foregoing order hereby approved.

BOGLE, BOGLE & GATES,
Proctors for Respondent and Claimant.

Filed Oct. 20. 1931. [47]

NOTICE OF FILING BOND ON APPEAL.

To Dimond Steamship Corporation, a Corporation, and to Bogle, Bogle & Gates, Its Proctors:

You, and each of you, will please take notice that upon the 14 day of October, 1931, Krauss Bros. Lumber Company, a corporation, appellant in the above-entitled cause, filed in the office of the District Court of the United States for the Western District of Washington, Northern Division, at Seattle, Washington, a cost and supersedeas bond in the total sum of Five Hundred Dollars ($500.00), a copy of which bond is herewith served upon you; and that the surety upon said cost and supersedeas bond on appeal is the American Surety Company of New York, a corporation duly organized and existing under and by virtue of the laws of the State of New York, of which it is a resident, the home office of said corporation being located at New York City. [48]

Dated this 14 day of October, 1931, at Seattle, Washington.

HAYDEN, MERRITT, SUMMERS & BUCEY,
Proctors for Appellant Krauss Bros. Lumber Company, a Corporation.

PROOF OF SERVICE.

Copy of the foregoing notice of filing cost and supersedeas bond on appeal, together with copy thereof after the filing of such bond, received and

due service thereof admitted upon this 14 day of October, 1931.

BOGLE, BOGLE & GATES,
Proctors for Dimon Steamship Corporation.

Filed Oct. 20, 1931. [49]

COST AND SUPERSEDEAS BOND.

KNOW ALL PERSONS BY THESE PRESENTS: That we, Krauss Bros. Lumber Company, a corporation, as Principal, and American Surety Company of New York, a corporation duly authorized to transact a surety business within the State of Washington, as Surety, are held and firmly bound unto Dimon Steamship Corporation, a corporation, Respondent and Claimant in the above-entitled cause, in the sum of Five Hundred Dollars ($500.00), to be paid to said Dimon Steamship Corporation, a corporation, its successors and assigns, for the full and complete payment of which, well and truly to be made, we bind ourselves, and each of us, our successors and assigns, jointly and severally firmly by these presents.

Signed and sealed this 7th day of October, 1931.

WHEREAS, said Krauss Bros. Lumber Company, a corporation, as libelant, has appealed to the United States Circuit Court of [50] Appeals for the Ninth Circuit from a certain final decree of the District Court of the United States for the Western District of Washington, Northern Division, in the above-entitled cause, signed by the

Honorable Jeremiah Neterer, Judge of said court, upon September 14, 1931, and thereafter, on September 18, 1931, filed with the Clerk of said court, said decree being in favor of Dimon Steamship Corporation, a corporation, as respondent and claimant, and against said Krauss Bros. Lumber Company, a corporation, as libelant, wherein and whereby said cause is dismissed, and judgment is granted in favor of said respondent and claimant, and against said libelant, for costs and disbursements taxed in the sum of $65.50; and

WHEREAS, Krauss Bros. Lumber Company, a corporation, during the progress of such appeal desires to stay execution of said decree,—

NOW, THEREFORE, the condition of this obligation is such that if the above-named principal, Krauss Bros. Lumber Company, a corporation, as appellant in the above-entitled cause, shall prosecute said appeal with effect, and shall pay all costs which may be awarded against it if the appeal is not sustained, and shall also abide by and perform whatever decree may be rendered by the United States Circuit Court of Appeals for the Ninth Circuit, in the above-entitled cause, or whatever decree may be rendered on the mandate of said appellate court by said District Court; then this obligation shall be void; otherwise the same shall continue in full force and effect.

KRAUSS BROS. LUMBER COMPANY,
a Corporation.

[Seal] By LANE SUMMERS,
Secy. [51]

AMERICAN SURETY COMPANY OF NEW YORK.

By S. H. MELROSE,
Its Resident Vice-President.

[Seal] Attest: J. M. TOMBERLIN,
Its Resident Assistant Secretary.

Signed, sealed, delivered and acknowledged by and in behalf of said surety this 7th day of October, 1931, before me the undersigned notary public.

[Seal] FRED S. MERRITT,
Notary Public in and for the State of Washington, Residing at Seattle.

The foregoing bond is hereby approved as a cost and supersedeas bond, with respect to form, amount, and surety thereon.

BOGLE, BOGLE & GATES,
Proctors for Respondent and Claimant, Dimon Steamship Corporation, a Corporation.

The foregoing bond is hereby approved as a cost and supersedeas bond, with respect to form, amount, and surety thereon.

JEREMIAH NETERER,
U. S. District Judge.

Filed Oct. 20, 1931. [52]

PRAECIPE FOR APOSTLES ON APPEAL.

To Ed. M. Lakin, Clerk of the Above-entitled Court:

You will please prepare and certify a true copy of certain papers on file in your office, and of record in the above-entitled cause, as apostles on appeal, to wit:

1. Libel, filed May 18, 1931.
2. Libelant's stipulation for costs, filed May 18, 1931.
3. Claim of Dimon Steamship Corporation, filed May 19, 1931.
4. Claimant's stipulation for costs, filed May 19, 1931.
5. Release bond, filed May 19, 1931.
6. Claimant's exceptions to libel, filed June 18, 1931.
7. Monition and attachment, filed July 11, 1931.
8. Citation, filed July 11, 1931.
9. Court's memorandum decision, filed July 14, 1931.
10. Libelant's petition for rehearing, filed July 27, 1931. [53]
11. Court's memorandum decision, denying rehearing, filed August 4, 1931.
12. Decree of dismissal, signed Sept. 14, 1931.
13. Statement.
14. This praecipe.
15. Assignments of error.
16. All other appeal papers.

HAYDEN, MERRITT, SUMMERS & BUCEY,
Proctors for Krauss Bros. Lumber Company,

Copy received this 14th day of October, 1931.

BOGLE, BOGLE & GATES,
Proctors for Krauss Bros. Lumber Company.

Filed Oct. 20, 1931. [54]

(Title of Court and Cause.)

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify that this typewritten transcript of record, consisting of pages numbered from 1 to 54, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, and that the same constitutes the record on appeal herein from the decree of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true, and correct statement of all expenses, costs, fees and charges incurred in my office or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, in the above-entitled cause, to wit: [55]

Clerk's fees (Act of Feb. 11, 1925) for making record, certificate or return, 121 folios at 15¢ per folio..... $18.15
Appeal fee (Sec. 5 of Act) 5.00
Certificate of Clerk to Transcript of Record .50

Total $23.65

I further certify that the above cost of preparing and certifying record, amounting to $23.65 has been paid to me by proctors for the appellant.

I further certify that I transmit herewith the original citation in the above-entitled cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the official seal of the said District Court at Seattle, in said District, this 5th day of November, 1931.

[Seal] ED. M. LAKIN,
Clerk of the United States District Court for the Western District of Washington.

By T. W. Egger,
Deputy. [56]

(Title of Court and Cause.)

CITATION ON APPEAL.

United States of America,
Western District of Washington,
Northern Division,—ss.

The President of the United States to Dimon Steamship Corporation, a Corporation, as Respondent and Claimant, and Bogle, Bogle & Gates, Its Proctors, GREETINGS:

You, and each of you, are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, in the city of San Francisco, State of California, upon the 10 day of November, 1931 (not exceeding thirty days from the date hereof), pursuant to appeal to said court, duly filed and taken in the office of the Clerk of the District Court of the United States for the Western District of Washington, Northern Division, wherein Krauss Bros. Lumber Company, a corporation, is appellant, and Dimon Steamship Corporation, a corporation, is appellee; then and there to show [57] cause, if any there be, why the final decree of the District Court of the United States for the Western District of Washington, Northern Division, signed by the Honorable Jeremiah Neterer, Judge of said court, upon September 14, 1931, and thereafter filed with the Clerk of said court upon September 18, 1931, as to which such appeal is filed and taken, should not be corrected and reversed, and why speedy justice should not be done in that behalf.

WITNESS the Honorable JEREMIAH NETERER, Judge of the District Court of the United States for the Western District of Washington, this 14 day of October, 1931.

[Seal] JEREMIAH NETERER,
U. S. District Judge.

Due service of the foregoing citation, and receipt of copy thereof after the filing of the same

in the office of the Clerk of the above-entitled court, is hereby admitted this 14 day of October, 1931.

BOGLE, BOGLE & GATES,
Proctors for Respondent and Claimant.

Filed Oct. 20, 1931. [58]

[Endorsed]: No. 6660. United States Circuit Court of Appeals for the Ninth Circuit. Krauss Bros. Lumber Company, a Corporation, Appellant, vs. Dimon Steamship Corporation, a Corporation, Claimant of the SS. "Pacific Cedar," Her Engines, Boilers, Tackle, Apparel and Furniture, Appellee. Apostles on Appeal. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed November 7, 1931.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6660

United States
Circuit Court of Appeals
For the Ninth Circuit

KRAUSS BROS. LUMBER COMPANY, a Corporation,

Appellant,

vs.

DIMON STEAMSHIP CORPORATION, a Corporation, Claimant of the S. S. "PACIFIC CEDAR," Her Engines, Boilers, Tackle, Apparel and Furniture,

Appellee.

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October Term, A. D. 1931 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court room thereof, in the City and County of San Francisco, in the State of California, on Friday, the eighteenth day of June, in the year of our Lord One Thousand Nine Hundred and Thirty-two.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge, Honorable FRANK H. NORCROSS, District Judge.

[Title of Cause.]

ORDER OF SUBMISSION.

ORDERED above case argued by Mr. Claude E. Wakefield, counsel for the appellee, and submitted on brief on behalf of appellant, with leave to counsel for appellant to file a reply brief on or before July 15, 1932.

At a stated term, to wit, the October Term, A. D. 1931 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court room thereof, in the City and County of San Francisco, in the State of California, on Thursday, the eighth day of September, in the year of our Lord One Thousand Nine Hundred and Thirty-two.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF DECREE.

By direction of the Court, ORDERED that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk and that a decree be filed and recorded in the minutes of this Court in accordance with the opinion filed.

[Title of Court and Cause.]

OPINION OF THE UNITED STATES CIRCUIT COURT OF APPEALS.

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Before: WILBUR and SAWTELLE, Circuit Judges, and NORCROSS, District Judge.

WILBUR, Circuit Judge:

The appellant filed a libel in rem against the steamship "Pacific Cedar," and in personam against her owner. The trial court sustained the exception to the libel filed by the respondent upon the ground that admiralty was without jurisdiction over the matter and dismissed the libel. From this decree the libellant takes this appeal.

The object of the action is to recover an overpayment of freight made by the libellant to the respondent. The claim arises from the contingent character of the contract of affreightment contained in the "booking agreement" dated November 22, 1929, by which the respondent undertook to carry the libellant's lumber loaded about January 17, 1930, at Puget Sound and Grays Harbor to Philadelphia or New York for $10 per thousand feet net measurement, but, "In the event regular intercoastal carrier moves similar cargo at lower rate, such lower rate is to be applied." The lumber was loaded between January 18 and January 25, 1930, and was discharged at New York, Philadelphia and Baltimore, between March 1 and 20, 1930. During that period respondent demanded and received $14,657.30 freight thereon, being at the rate of $10 per thousand net measurement. In the month of January a regular intercoastal carrier, the Luckenbach Steamship Company, moved similar cargo from Seattle, Washington, to Boston, Massachusetts, at the rate of $8.50 per thousand feet, consequently the freight that should have been charged and collected by respondent at this lower rate was $12,458.71, wherefore libellant seeks to collect the difference of $2198 with interest at six per cent per annum from March 20, 1930. There is no allegation that either party to the contract of affreightment knew of the carriage of lumber at the lower rate by the Luckenbach Steamship Company, nevertheless the respondent demanded

and received the higher rate. The position of the appellee is thus stated in its brief:

> "Appellee admits here, and has never contended otherwise, that a contract of affreightment is maritime. From this fact, however, it does not follow that the matter before the court in this case is maritime, merely because it is based upon a clause physically contained in a contract of affreightment. Such appears to be appellant's contention.
>
> A contract of affreightment is within admiralty jurisdiction because it is primarily a maritime contract with respect to the ship, cargo and freight. Any breach of such contract in connection with the loading, carriage and safe delivery of cargo having to do with the ship, cargo or freight, is certainly within admiralty jurisdiction, but after the affreightment has been fully performed by safe delivery, according to the terms of the contract, and freight voluntarily paid by the shipper, an action by the shipper (appellant here) to recover from the carrier a sum of money alleged to be due by reason of a contingent claim to-wit: that some other intercoastal carrier carried similar cargo at a lesser rate, and not based upon a claim connected in any way with the maritime features of such contract, or the duties imposed or arising out of said contract, is certainly not maritime. Such action is one

in assumpsit to recover money had and received."

We think it clear, however, that the contingent agreement is not so remote from the contract of affreightment as appellee indicates. It is not an agreement to rebate freight earned but fixes the freight by reference to the conduct of competitors. The agreement was to pay $8.50 and no more, as it turned out, consequently the demand by the appellee for payment in excess of that amount was unauthorized and was clearly a violation of the express terms of the contract, although apparently neither party at that time knew of that fact.

As we understand it, appellee concedes that had the appellant raised the contention that the freight rate was $8.50 per thousand before delivery, and had appellee compelled the payment of $10 per thousand as a condition to delivery, admiralty would have jurisdiction of the action to recover the overpayment thus exacted as a condition to delivery. At any rate, this court has decided in *Tatsuuma K. K. K. v. Robert Dollar Co.*, 31 F. (2d) 401, 402, that excessive charges thus exacted can be recovered in admiralty. District Judge Bean, speaking for this court, there said:

"It is urged by the appellant that the matter here involved is not cognizable in admiralty. But the issue between the parties cannot be determined without a consideration and review of the terms of the bill of lading, and, as said by Gibson, District Judge, speak-

ing for the Court of Appeals in 286 Fed. 918: 'From time immemorial the construction of such contracts, and the determination of issues arising out of them, has been part of the duties of courts of admiralty.' 1 U. S. Shipping Bd. v. Banque Russo Asiatique. See, also, The G. A. Tomlinson (D. C.), 279 F. 736; The John Francis (D. C.), 184 F. 746; The Lake Eckhart (D. C.), 31 F. (2d) 804, 1924 A. M. C. 498."

The contract of affreightment is as definitely determined to be a maritime contract as is a charter party. For instance the Supreme Court in *Morewood, et al. v. Enequist,* 23 How. 491, 493, 16 L. Ed. 516, thus stated the matter:

"In the argument in this court, the counsel, without abandoning the original defense, have expended much learning and ingenuity in an attempt to demonstrate that a court of admiralty in this country, like those of England, has no jurisdiction over contracts of charter-party or affreightment. They did not seem to deny that these are maritime contracts, according to any correct definition of the terms, but rather require us to abandon our whole course of decision on this subject, and return to the fluctuating decisions of English common law judges, which, it has been truly said, 'are founded on no uniform principle, and exhibit illiberal jealousy and narrow prejudice.'

The errors of those decisions have mostly been corrected by legislation in the country of their origin; they have never been adopted in this.

We do not feel disposed to be again drawn into the discussion of the arguments which counsel have reproduced on this subject. The case of The New Jersey Steamboat Company v. The Merchants' Bank of Boston (6 How. 334), was twice argued (in 1847 and 1848) at very great length. The whole subject was most thoroughly investigated, both by counsel and the court. Everything connected with the history of courts of admiralty, from the reign of Richard II to the present day—everything which the industry, learning and research of most able counsel could discover, was brought to our notice. We then decided that charter-parties and contracts of affreightment are 'maritime contracts' within the true meaning and construction of the Constitution and Act of Congress and cognizable in courts of admiralty by process either in rem or in personam."

In *Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109, 68 L. Ed. 582, the Supreme Court had under consideration an action to recover money paid as charter hire where the vessel hired failed to make the voyage; the court held that the claim was within admiralty jurisdiction, and stated, at p. 120:

> "The claim to recover an amount paid under a charter party as charter hire is within the admiralty jurisdiction. Morewood v. Enequist, 23 How. 491, 16 L. Ed. 516."

In a more recent case (*Matson Nav. Co. v. U. S.*, 284 U. S. 352, decided January 4, 1932), where the plaintiff sought to recover compensation in the Court of Claims for increased wages and bonuses paid by it to the masters and crews of seven vessels operated by it for the United States, it was held that the agreement for the operation of the ships was maritime and that the Court of Claims was without jurisdiction to determine the matter which was within admiralty jurisdiction. If an action to recover unpaid charter hire is cognizable in admiralty after the charter party has expired, it would seem that an action to recover unpaid freight would likewise be within admiralty jurisdiction (see 36 *Cyc.* 312, § 5; *Thatcher v. McCulloh*, 23 Fed. Cas. No. 13,862), and if an action to recover additional freight would be so cognizable it is equally clear that an action to recover an overpayment would likewise be within admiralty jurisdiction. It is true that Judge Learned Hand in *Israel v. Moore and McCormick Co.*, 295 Fed. 919, decided April 8, 1920, held that freight overpaid by mistake of the consignee due to the fact that a portion of the cargo had been jettisoned, could not be recovered in admiralty because such recovery was based upon a legal fiction which implied a promise to repay the excessive charges,

when in fact no such agreement existed. He thus distinguished the case before him from that of *The Oceana* (D. C.), 148 Fed. 131, where the charterer sued to recover an overpayment of freight due to the failure of the ship to deduct certain payments made by the charterer, as had been agreed. In the case at bar we have an agreement in the contract of affreightment to deduct from the $10 rate any amount over the charge made by a regular intercoastal carrier for moving similar cargo to the East Coast. If there is a reasonable basis for this distinction between an express and an implied agreement to reduce freight, as applied to an overpayment of freight, the case at bar comes within the rule announced in *The Oceana,* supra, which Judge Hand thus distinguishes from his decision in *Israel v. Moore and McCormick Co.,* supra:

> "The ship [The Oceana] had agreed to deduct from the freight all disbursements paid by the charterer, who mistakenly overpaid her. The right of recovery rested upon the ship's unfilled promise, and could indeed have been so pleaded at law, the payment and mistake in payment being successively pleaded in a voidance as plea and replication. The right to sue in indebitatus assumpsit should not obscure that very obvious difference."

We do not find that the decision of Judge Hand has been cited on this point in any later case. In the case at bar, as we have pointed out, the amount

overpaid was exacted in violation of the express contract of affreightment, and the question of the amount of freight to be paid depends upon the interpretation of that contract.

We think it clear from the foregoing authorities that, where the agreement of affreightment, by or on behalf of the ship, required the transportation of the cargo for $8.50 per thousand feet of lumber and the ship exacts the greater rate of $10.00 per thousand feet, and the same is voluntarily paid by reason of mutual mistake at the time of delivery, admiralty has jurisdiction over an action to recover such overpayment in a libel in personam.

The question remaining is whether there is a maritime lien against the Steamship "Pacific Cedar" which can be enforced in admiralty in rem. The basis for a maritime lien upon the ship in cases involving a contract of affreightment is thus stated by the Supreme Court in *Vandewater v. Mills, The Yankee Blade,* 60 U. S. 82, 90:

> "This lien or privilege is founded on the rule of maritime law as stated by Cleirac (597): 'Le batel est obligee a la marchandise et la marchandise au batel.' The obligation is mutual and reciprocal. The merchandise is bound or hypothecated to the vessel for freight and charges (unless released by the covenants of the charter party), and the vessel to the cargo. The bill of lading usually sets forth the terms of the contract, and shows the duty

assumed by the vessel. Where there is a charter-party, its covenants will define the duties imposed on the ship. Hence it is said (1 Valin, Ordon. de Mar., b. 3, tit. 1, art. 11), that 'the ship, with her tackle, the freight, and the cargo, are respectively bound (affectée) by the covenants of the charter party.' But this duty of the vessel, to the performance of which the law binds her by hypothecation, is to deliver the cargo at the time and place stipulated in the bill of lading or charter party, without injury or deterioration."

In the case of *Osaka Shosen Kaisha v. Pacific Export Lbr. Co.*, 260 U. S. 490, 499, this doctrine was reiterated by the Supreme Court, as follows:

"The maritime privilege or lien, though adhering to the vessel, is a secret one, which may operate to the prejudice of general creditors and purchasers without notice, and is therefore stricti juris, and cannot be extended by construction, analogy, or inference. Vandewater v. Mills, supra. The contract of affreightment itself creates no lien, and this court has consistently declared that the obligation between ship and cargo is mutual and reciprocal, and does not attach until the cargo is on board or in the master's custody. We think the lien created by the law must be mutual and reciprocal; the lien of the cargo owner upon the ship is limited by the corresponding and reciprocal rights of the ship owner upon the

cargo. See The Thomas P. Sheldon, 113 Fed. 779, 782, 783."

To enforce a lien against the ship where neither the owner or master of the ship on the one hand, or the owner of the cargo on the other, knew of the facts upon which the lien is predicated until after the right delivery of the cargo, and where no visible fact or occurrence would give notice of the lien to the public would press the doctrine of a maritime lien beyond reason and beyond authoritative decision. We concur in the conclusion of the trial judge that under the circumstances of this case no maritime lien exists on the ship.

The decree dismissing the libel in rem is affirmed and the dismissal of the libel in personam is reversed with directions to the trial court to enter a judgment against the Dimon Steamship Corporation for $2,198 with interest at six per cent from March 20, 1930.

(Endorsed:) Opinion. Filed September 8, 1932. Paul P. O'Brien, Clerk.

At a stated term, to-wit, the October Term, A. D. 1932, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday, the seventh day of November, in the year of our Lord one thousand nine hundred and thirty-two.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding; Honorable WILLIAM H. SAWTELLE, Circuit Judge.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION ON PETITION FOR MODIFICATION OF OPINION, ETC.

By direction of the court, ORDERED that the typewritten opinion this day rendered by this court in above cause on petition of appellee for modification of opinion be forthwith filed by the clerk and that an order be entered in the minutes of this court in accordance therewith, and that the decree filed and entered September 8, 1932, be vacated and set aside.

[Title of Court and Cause.]

OPINION OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

On Petition for Modification of Opinion.

Before: WILBUR and SAWTELLE, Circuit Judges, and NORCROSS, District Judge.

WILBUR, Circuit Judge:

Appellee petitions for the modification of the order in so far as it directs an entry of a judgment against the Dimon Steamship Corporation for $2198, with interest at six per cent from March 20, 1930. The petitioner has apparently assumed throughout that in the event its exceptions to the jurisdiction of the admiralty Court were not sustained, it would have leave to file an answer. No appplication was made in this Court for leave to answer in the event that the order of the District Court sustaining the exceptions was reversed. In view of the fact that the hearing in this Court was a trial de novo, an order was made finally disposing of the matter by directing the entry of a judgment in favor of the appellant. It is evident from the petition that the appellee was taken by surprise by the order made. The appellant did not request or contend that the order of this Court, if predicated

upon a reversal of the order of the trial Court, should direct an entry of the judgment.

Appellee states in its petition, "Appellee has a defense in this case and one which will clearly defeat any recovery by the appellant." We are not yet advised of the nature of this defense.

Appellee will be given thirty days in which to appply to this Court for leave to file its proposed answer; ten days' notice of the application will be given to the appellant.

[Endorsed:] Opinion. Filed November 7, 1932. Paul P. O'Brien, Clerk.

At a stated term, to-wit; the October Term, A. D. 1932, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday, the seventh day of November, in the year of our Lord one thousand nine hundred and thirty-two.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding; Honorable WILLIAM H. SAWTELLE, Circuit Judge.

[Title of Cause.]

ORDER ON PETITION FOR MODIFICATION OF OPINION.

Upon consideration of appellee's petition for modification of opinion of this court in above cause, rendered and filed on Sept. 8, 1932, and of appellant's reply thereto and of appellee's reply, and pursuant to the opinion this day rendered and filed, IT IS ORDERED that leave be, and hereby is granted appellee to apply to this court within thirty days for leave to file its proposed answer, upon at least ten days notice of the application being given to appellant.

IT IS FURTHER ORDERED that the decree filed and entered in this court in this cause on Sept. 8, 1932, be, and hereby is vacated and set aside.

At a stated term, to-wit, the October Term, A. D. 1932, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Thursday, the twenty-second day of December, in the year of our Lord one thousand nine hundred and thirty-two.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding; Honorable WILLIAM H. SAWTELLE, Circuit Judge; Honorable JULIAN W. MACK, District Judge.

[Title of Cause.]

ORDER GRANTING ANCILLARY RECEIVERS LEAVE TO FILE PROPOSED ANSWER, AND REMANDING CAUSE TO DISTRICT COURT, ETC.

Upon consideration of petition of Messrs. John Ambler and J. Raymond Tiffany, ancillary receivers of Dimon Steamship Corporation, etc., appellee herein, for leave to file an answer in this cause, and of the proposed answer, and of the objections of appellant thereto, and good cause therefor appearing, IT IS ORDERED that leave be, and hereby is granted said John Ambler and J. Raymond Tiffany, ancillary receivers, etc., to file said answer.

IT IS FURTHER ORDERED that this cause be, and hereby is remanded to the said District Court with directions to said District Court to try the issues raised thereby.

[Title of Court and Cause.]

MOTION FOR CLARIFYING THE RECORD.

Comes now appellant above named, and for the purpose of clarifying the record in the above entitled cause, makes motion as follows:

1. For order of the above entitled court recalling the mandate heretofore issued in the above entitled cause to the District Court of the United States for the Western District of Washington, Northern Division.

2. Upon the return of said mandate, for entry of final decree in conformity with the opinion of this court, filed September 8, 1932, dismissing appellant's libel in rem, in so far as such libel claims and asserts a maritime lien against the steamship "Pacific Cedar."

3. Also upon the return of said mandate, for order of the above entitled court in personam, remanding to said District Court said cause in so far as said libel claims and asserts a cause of action against the appellee as respondent in personam, for the purpose of trial on issues of fact to be joined upon proposed answer of respondent Dimon Steamship Corporation or the receivers thereof.

This motion is based upon the record in the above entitled cause, and upon authorizing stipulation hereunto attached and by this reference made a part hereof.

FARNHAM GRIFFITHS,
LANE SUMMERS,
McCUTCHEN, OLNEY, MANNON & GREENE,
HAYDEN, MERRITT, SUMMERS & BUCEY,

Proctors for Appellant.

[Endorsed:] Filed Jan. 9, 1933. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

STIPULATION FOR CLARIFYING THE RECORD.

WHEREAS the libel in this cause claimed and asserted a cause of action against the respondent steamship "Pacific Cedar" in rem, and also against the respondent Dimon Steamship Corporation in personam;

WHEREAS, upon exceptions to said libel, the same was dismissed by the District Court as to both the cause of action in rem and the cause of action in personam;

WHEREAS, pursuant to its opinion filed September 8, 1932, this court affirmed the District Court by dismissing said libel in rem, and reversed the District Court by recognizing admiralty jurisdiction in personam and granting judgment against the respondent Dimon Steamship Corporation in personam for the amount claimed;

WHEREAS appellee subsequently filed a petition for modification of the opinion and decree of this court in so far as it granted judgment in personam, in consideration of which petition this court entered an order on November 7, 1932, whereby its decree of September 8, 1932, was vacated and set aside.

WHEREAS, since the filing by ancillary receivers for the appellee of petition to file an answer

to said libel, an order was entered by this court on December 22, 1932, remanding this cause to the District Court for trial upon issues to be raised by the proposed answer of such ancillary receivers;

Whereas, there has thus arisen ambiguity in the record as to the status and finality of the decree of this court entered on September 8, 1932, in so far as the same dismissed the libel in rem;

NOW, THEREFORE, for the purpose of clarifying the record herein concerning the disposition by this court of the maritime lien asserted by appellant through said libel, by and between appellant above named, appellee above named, and said ancillary receivers, it is hereby stipulated:

1. That upon motion filed by appellant, without notice, and upon the authority hereof, this court may enter an order recalling its mandate heretofore issued to the District Court, and thereafter may enter its final order in this cause, dismissing said libel in rem against the respondent steamship "Pacific Cedar," and remanding this cause in personam to the District Court for trial upon issues of fact raised by the proposed answer of said ancillary receivers.

2. That the purpose of this stipulation being purely for clarity and certainty in the record, it shall not be deemed to prejudice the substantive rights of any party hereto.

Dated this 6th day of January, 1933.

LANE SUMMERS,
HAYDEN, MERRITT, SUMMERS & BUCEY,
Proctors for Appellant.

LAWRENCE BOGLE,
CASSIUS E. GATES,
CLAUDE E. WAKEFIELD,
BOGLE, BOGLE & GATES,
Proctors for Appellee.

JOHN AMBLER and
J. RAYMOND TIFFANY,
Ancillary Receivers Dimon Steamship Corp.

[Endorsed]: Filed January 9, 1933. Paul P. O'Brien, Clerk.

At a stated term, to wit, the October Term, A. D. 1932 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Tuesday the tenth day of January in the year of our Lord one thousand nine hundred and thirty-three.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding; Honorable WILLIAM H. SAWTELLE, Circuit Judge; Honorable FRANK H. NORCROSS, District Judge.

[Title of Cause.]

ORDER RECALLING MANDATE.

Upon consideration of the motion of proctors for the appellant for the recall of the mandate of this court in above cause heretofore issued on December 22, 1932, and good cause therefor appearing, IT IS ORDERED that the said mandate issued to the District Court of the United States for the Western District of Washington, Northern Division, remanding this cause to that court with directions to try the issues raised by the answer of the Ancillary Receivers herein be, and hereby is recalled.

At a stated term, to wit, the October Term, A. D. 1932 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Tuesday the tenth day of January in the year of our Lord one thousand nine hundred and thirty-three.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding; Honorable WILLIAM H. SAWTELLE, Circuit Judge; Honorable FRANK H. NORCROSS, District Judge.

[Title of Cause.]

ORDER DIRECTING ENTRY OF DECREE, ETC.

Upon motion of proctors for appellant, orally presented by Mr. Farnham P. Griffiths, proctor for appellant, and good cause therefor appearing, IT IS ORDERED that a decree be filed and entered in this cause as of this date, in accordance with the opinion of this court rendered on September 8, 1932, and providing for the remanding of this cause in personam to the District Court to try the issues of fact raised by the answer of the Ancillary Receivers.

United States Circuit Court of Appeals
for the Ninth Circuit.

No. 6660

KRAUSS BROS. LUMBER COMPANY, a Corporation,

Appellant,

vs.

DIMON STEAMSHIP CORPORATION, Claimant, etc.,

Appellee.

DECREE.

APPEAL from the District Court of the United States for the Western District of Washington, Northern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the District Court of the United States for the Western District of Washington, Northern Division, and on the motion of the appellant for entry of final decree in conformity with the opinion of this court rendered on September 8, 1932, and providing for remanding of this cause in personam to the District Court to try the issues of fact raised by the answer of the Ancillary Receivers, and was duly submitted:

ON CONSIDERATION WHEREOF, it is now here ordered, adjudged and decreed by this court that the decree of the said District Court dismissing the libel in rem in this cause be, and hereby is affirmed, and the decree of the said District Court dismissing the libel in personam be, and hereby is reversed, with costs in favor of the appellant and against the appellee, and that this cause in personam be, and hereby is remanded to the said District Court with directions to try the issues of fact raised by the answer of the Ancillary Receivers John Ambler and J. Raymond Tiffany.

It is further ordered, adjudged and decreed by this court, that the appellant recover against the appellee for its costs herein expended, and have execution therefor.

[Endorsed]: Decree. Filed and entered January 10, 1933. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

PRAECIPE FOR CERTIFIED TRANSCRIPT.

To Paul O'Brien, Clerk of the above entitled court:

Supplementing previous praecipe for certified transcript, you are requested to be kind enough to prepare and certify transcript of record in the above entitled cause, in conformity with the rules and practice of the Supreme Court of the United States relative to application for and review upon writ of certiorari, such transcript to include the following:

1. The entire printed transcript of record upon which the case was heard in the above entitled court;

2. Order of submission;

3. Order directing filing of opinion;

4. Opinion filed September 8, 1932;

5. Decree entered September 8, 1932;

6. Any order actually entered staying mandate;

7. Any application for stay of mandate which has been granted by order;

8. Bond for stay of mandate;

9. Opinion filed November 7, 1932;

10. Order of November 7, 1932, directing filing of opinion and vacating decree of September 8, 1932;

11. Order of November 7, 1932, granting leave to apply for leave to file answer, and vacating decree of September 8, 1932;

12. Order of December 22, 1932, granting leave to file answer, and remanding cause for trial;

13. Appellant's motion of January 7, 1933, to clarify the record, and supporting stipulation;

14. Order of January 10, 1933, recalling mandate;

15. Decree of January 10, 1933, affirming decree of District Court dismissing libel in rem, and reversing decree of District Court dismissing libel in personam and remanding cause in personam for trial;

16. This praecipe;

17. All other proceedings, if any, customarily included in such transcript;

18. Clerk's usual certificate.

Dated at Seattle, Washington, this 20th day of January, 1933.

LANE SUMMERS,
HAYDEN, MERRITT, SUMMERS & BUCEY,
Proctors for Appellant.

Due service of the foregoing praecipe is acknowledged, and receipt of copy is hereby admitted this 20th day of January, 1933.

The foregoing praecipe is hereby approved.

LAWRENCE BOGLE,
CLAUDE E. WAKEFIELD,
BOGLE, BOGLE & GATES,
Proctors for Appellee.

JOHN AMBLER,
J. RAYMOND TIFFANY,
Ancillary Receivers Dimon Steamship Corporation,
By B. McC. G.
As Ancillary Receivers of Dimon Steamship Corporation.

[Endorsed]: Filed January 23, 1933. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

APPLICATION FOR STAY OF MANDATE.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now appellant above named, and hereby makes application for order staying the mandate of the above entitled court upon its decree filed January 10, 1933, and staying execution and enforcement of said decree for a reasonable time, to-wit, until the expiration of three months next following the date of said decree, for the purpose of enabling appellant to apply for and obtain a writ of certiorari from the Supreme Court of the United States, and thereafter until final ruling by said Supreme Court of the United States.

This application is based upon the record in the above entitled cause, and upon stay bond hereto attached, and by this reference made a part hereof.

Dated this 28th day of January, 1933, at Seattle, Washington.

LANE SUMMERS,
HAYDEN, MERRITT, SUMMERS & BUCEY,
Proctors for Appellant.

United States of America,
State of Washington,
County of King.—ss.

Lane Summers, being first duly sworn, upon oath deposes and says:

That he is an attorney at law, and a member of the firm of Hayden, Merritt, Summers & Bucey; that as such he is one of the proctors of record for appellant above named; that stay of mandate and execution is not sought merely for purposes of delay; that he verily believes jurisdictional grounds and meritorious reasons exist, entitling appellant to a review by the Supreme Court of the United States of the above entitled cause; and that the foregoing application for stay, and the contemplated application for a writ of certiorari, are well founded in law; that appellant has filed praecipe for transcript of record and directed the printing thereof and has prepared its petition for writ of certiorari and brief in support thereof, excepting only page references to the record.

LANE SUMMERS.

Subscribed and sworn to before me this 28th day of January, 1933.

[Seal] W. H. HAYDEN,
Notary Public in and for the State of Washington, residing at Seattle.

Service of the foregoing application and accompanying bond is hereby acknowledged, and receipt of copy thereof admitted on this 30th day of January, 1933.

LAWRENCE BOGLE,
CLAUDE E. WAKEFIELD,
BOGLE, BOGLE & GATES,
Proctors for Appellee.
JOHN AMBLER &
J. RAYMOND TIFFANY,
Ancillary Receivers.

[Endorsed]: Filed February 1, 1933. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

ORDER STAYING MANDATE.

Upon appellant's verified application for stay of mandate in the above entitled cause, and stay of execution and enforcement of decree of this court in said cause, for the purpose of enabling appellant to petition for and obtain a writ of certiorari from the Supreme Court of the United States, it appearing to the court that such application has been presented timely and has been accompanied by security proper as to form and adequate as to amount,

NOW, THEREFORE, it is hereby ORDERED:

1. That such security be and the same hereby is approved as to form, amount and surety;

2. That said application of appellant be and the same hereby is granted, appellant being allowed to and including February 28, 1933, within which to make and file its petition and other requisite papers for writ of certiorari by the Supreme Court of the United States;

3. That in the event appellant shall so make and file its petition within said time, then such mandate, together with the execution and enforcement of judgment thereon, shall be stayed, pending the final determination of the above entitled cause by the Supreme Court of the United States.

Done this 1st day of February, 1933.

CURTIS D. WILBUR,
U. S. Circuit Judge.

Service of the foregoing order staying mandate, by receipt of copy thereof, is admitted this 30 day of January, 1933.

LAWRENCE BOGLE,
CLAUDE E. WAKEFIELD,
BOGLE, BOGLE & GATES,
Proctors for Appellee.
JOHN AMBLER &
J. RAYMOND TIFFANY,
Ancillary Receivers.

[Endorsed]: Filed February 1, 1933. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

BOND UPON STAY OF MANDATE.

KNOW ALL PERSONS BY THESE PRESENTS: That we, appellant KRAUSS BROS. LUMBER COMPANY, a corporation, as Principal, and AMERICAN SURETY COMPANY OF NEW YORK, a corporation, as Surety, are hereby held and firmly bound unto DIMON STEAMSHIP CORPORATION, a corporation, its successors and assigns, in the full sum of one thousand dollars ($1000.00), to the payment of which, well and truly to be made, we jointly and severally bind ourselves, our successors and assigns firmly by these presents.

Signed, sealed and delivered at Seattle, Washington, this 28th day of January, 1933.

The condition of the foregoing obligation is such that,

WHEREAS, said appellant feels aggrieved by, and considers error was committed in that certain decree of the United States Circuit Court of Appeals for the Ninth Circuit, filed January 10, 1933, in the above entitled cause, wherein and whereby said court denied the existence of a maritime lien, and ordered dismissed the libel of said appellant in so far as the same attempted to assert a maritime lien and to obtain the benefits thereof, affirming the decree of the United States District Court for the Western District of Washington, Northern Division, in its dismissal of appellant's libel in rem; and

WHEREAS, said appellant, contemporaneously with the execution and presentation of this bond, is applying to said Circuit Court of Appeals for an order staying its mandate and staying execution and enforcement of its decree;

NOW, THEREFORE, if said appellant shall make and file its application or petition for writ of certiorari within the period of time allowed therefor, and shall obtain said writ of certiorari from the Supreme Court of the United States, and shall make good its plea and maintain its contentions in said Supreme Court of the United States, or, in default thereof, shall answer for and pay to Dimon Steamship Corporation, a corporation, John Ambler and J. Raymond Tiffany, as ancillary receivers thereof, and/or the successors thereof, all damages and costs resulting from such failure, or by reason of said stay of the mandate of said Circuit Court of Appeals; then this obligation shall be null and void; otherwise the same shall continue in full force and effect.

Principal

[Seal] KRAUSS BROS. LUMBER COMPANY,
a corporation,
By A. J. KRAUSS,
President.

Attest:

LANE SUMMERS,

Secretary.

Surety

[Seal] AMERICAN SURETY COMPANY OF NEW YORK,

By S. H. MELROSE,

Res. Vice President.

Attest:

B. L. JOLLY,

Res. Asst. Secretary.

Approved as to form, amount and surety, this 1st day of February, 1933.

CURTIS D. WILBUR,

U. S. Circuit Judge.

It is hereby STIPULATED that the foregoing bond may be filed by appellant, in cancellation of, and in substitution for previous "Bond Upon Stay of Mandate," dated October 4, 1932.

LAWRENCE BOGLE,
CLAUDE E. WAKEFIELD,
BOGLE, BOGLE & GATES,
Proctors for Appellee.

JOHN AMBLER &
J. RAYMOND TIFFANY,
Ancillary Receivers.

United States of America,
State of Washington,
County of King.—ss.

This is to certify that on this 30th day of January, 1933, before me personally appeared A. J. Krauss and Lane Summers, to me known to be the President and Secretary, respectively, of Krauss Bros. Lumber Company, one of the corporations that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument, and that the seal affixed is the corporate seal of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal the day and year in this certificate first above written.

[Seal] FRED S. MERRITT,
Notary Public in and for the State of Washington, residing at Seattle.

United States of America,
State of Washington,
County of King.—ss.

This is to certify that on this 28 day of January, 1933, before me personally appeared S. H. Melrose and B. L. Jolly, to me known to be the Resident Vice President and Resident Assistant Secretary, respectively, of American Surety Company of New York, one of the corporations that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument, and that the seal affixed is the corporate seal of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal the day and year in this certificate first above written.

[Seal] A. E. KRULL,
Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed February 1, 1933. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, PAUL P. O'BRIEN, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing ninety-seven (97) pages, numbered from and including 1 to and including 97, to be a full, true and correct copy of the record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to praecipe of proctors for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the original thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 6th day of February, A. D. 1933.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 10, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(3291)